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AH MOI

v.

TENAGA NASIONAL BHD

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COURT OF APPEAL, PUTRAJAYA

DENIS ONG JCA

HASHIM YUSOFF JCA

ARIFIN JAKA JCA

[CIVIL APPEAL NO: J-02-71-1998]

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15 JUNE 2009

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ADMINISTRATIVE LAW: *Rules of natural justice - Domestic discipline - Exercise of administrative powers - Dismissal of employee - Officer framing charge against appellant present at inquiry - Failure by Disciplinary Board to give grounds for dismissal - Whether in breach of rules of natural justice - Whether dismissal void*

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The appellant, a junior technician with the respondent, was demoted in rank by the respondent's Disciplinary Board following a disciplinary proceeding held against him on 17 July 1984. Subsequently, the Disciplinary Board held a second disciplinary proceeding against the appellant and, notwithstanding the appellant's absence thereof, decided to dismiss him from service. The appellant appealed and argued before the learned appellate judges herein that the dismissal was void and was vitiated with prejudice as: (i) he was absent in the second disciplinary proceeding and in any case, Khalidah Haron ('SD2'), the respondent's officer who drafted the charge with a view to dismissing him, was present in the proceedings; and (ii) there was non-compliance of the respondent's own Rules and Regulations ('NEB Rules') in particular r. 32.1 thereof when the Disciplinary Board failed to give any grounds for its decision to dismiss him from the respondent's service.

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Held (allowing appeal and ordering damages to be assessed)
H Per Hashim Yusoff JCA delivering the judgment of the court:

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- (1) A disciplinary proceeding is quasi-criminal in nature and therefore strict compliance of its procedural rules and regulations need to be observed. (para 11)
- (2) The appellant's absence at the 2nd disciplinary proceeding was due to his own misdoing by deliberately refusing to accept the show cause letter posted to him by the respondent. In fact

the respondent had taken all reasonable steps to give the appellant every opportunity to explain regarding his misconduct in the unauthorized supply of electricity to the 6 squatter houses. There was therefore no merit in the appellant's argument on this point. (para 12)

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(3) Bearing in mind *Rohana Ariffin & Anor v. University Sains Malaysia*, there was a breach of the rules of natural justice by SD2's presence at the disciplinary proceedings against the appellant. (paras 13-15)

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(4) The NEB Rules were made under s. 89 of the Electricity Act 1949. It was a fact that the respondent made their charge against the appellant based on the NEB Rules and thereafter also dismissed him under the same Rules. The respondent therefore cannot now say that these Rules had no force of law. (para 18)

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(5) The respondent's letter dated 26 May 1986 informing the appellant of his dismissal from service with immediate effect did not provide any ground for the dismissal. The non-compliance of r. 32.1 of the NEB Rules and the failure to give the appellant the reasons for his dismissal were clearly in breach of the rules of natural justice. The appeal is hence allowed. (paras 19 & 22)

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Bahasa Malaysia Translation Of Headnotes

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Perayu, seorang juruteknik rendah dalam perkhidmatan responden, telah dikenakan hukuman turun pangkat oleh Lembaga Disiplin responden ekoran satu prosiding tatatertib yang diambil terhadapnya pada 17 Julai 1984. Berikutnya, Lembaga Disiplin telah mengadakan prosiding tatatertib kedua terhadap perayu, dan walaupun perayu tidak menghadiri diri di prosiding tersebut, beliau telah dibuang kerja oleh responden. Perayu merayu dan berhujah di hadapan yang arif hakim-hakim rayuan di sini bahawa pembuangan kerjanya adalah tak sah dan terjejas oleh prejudis kerana: (i) beliau tidak hadir di prosiding tatatertib kedua, dan walau apapun, Khalidah Haron ('SD2'), iaitu pegawai responden yang merangka pertuduhan dengan tujuan untuk membuang kerjanya, telah hadir dalam prosiding terhadapnya; dan (ii) wujud ketidakpatuhan terhadap Kaedah-kaedah dan Peraturan-peraturan responden ('Kaedah NEB') terutama terhadap per. 32.1 nya, bilamana Lembaga Disiplin gagal memberikan sebarang alasan bagi keputusan mereka membuang kerja beliau.

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**A Diputuskan (membenarkan rayuan dan memerintahkan taksiran gantirugi)
Oleh Hashim Yusoff HMR menyampaikan penghakiman mahkamah:**

- B** (1) Suatu prosiding tatatertib adalah berbentuk separa-jenayah dan dengan itu kaedah-kaedah serta peraturan-peraturan prosedurnya hendaklah dipatuhi dengan ketat.
- C** (2) Ketidakhadiran perayu di prosiding disiplin kedua adalah disebabkan oleh kesalahannya sendiri kerana sengaja enggan menerima surat tunjuk sebab yang diposkan kepadanya oleh responden. Responden malah telah mengambil segala langkah munasabah demi untuk memberikan setiap peluang kepada perayu untuk membuat penjelasan atas salahlakunya
- D** berhubung pembekalan elektrik haram kepada 6 buah rumah setinggan tersebut. Oleh itu, tiada merit pada hujah perayu berkaitan persoalan ini.
- E** (3) Mengambil kira *Rohana Ariffin & Anor v. University Sains Malaysia*, terdapat kemungkiran terhadap kaedah-kaedah keadilan asasi dalam prosiding terhadap perayu disebabkan oleh kehadiran SD2.
- F** (4) Kaedah-kaedah NEB dibuat di bawah Akta Elektrik 1949. Fakta menunjukkan bahawa responden membuat pertuduhan ke atas perayu berdasarkan Kaedah NEB dan begitu juga telah membuang kerja perayu di bawah Kaedah-kaedah yang sama. Oleh yang demikian, responden tidak boleh sekarang mengatakan bahawa Kaedah-kaedah tidak mempunyai kuatkuasa undang-undang.
- G** (5) Surat responden bertarikh 26 Mei 1986 yang memberitahu perayu mengenai pembuangan kerja beliau secara serta merta tidak memberikan sebarang alasan atas keputusan tersebut. Adalah jelas bahawa ketidakpatuhan terhadap per. 32.1
- H** Kaedah NEB dan kegagalan memberi alasan ini telah melanggar kaedah-kaedah keadilan asasi. Rayuan dengan itu adalah dibenarkan.

Case(s) referred to:

Rohana Ariffin & Anor v. University Sains Malaysia [1989] 1 MLJ 487

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Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC (refd)

Legislation referred to:

Electricity Act 1949, s. 89A

For the appellant - Alex Charles; M/s Nur Ashikin, Alex & Rakan-Rakan

For the respondent - S Patmanathan; M/s Mohd Akhir & Partners

[Editor's note: Electricity Act 1949 has since been repealed and replaced by Electricity Supply Act 1990]

Reported by Wan Sharif Wan Ahmad

JUDGMENT**Hashim Yusoff JCA:**

[1] The appellant appealed against the decision of the High Court of Johor Bahru which had dismissed his application for declaratory reliefs against the respondent's decision to dismiss him from their service. Before the hearing of this appeal the appellant, Ponnann a/l Subramaniam had since died on 22 June 2001 and he was substituted by his widow, Ah Moi, to be his personal representative in this appeal by order of this court dated 18 August 2003.

[2] We had unanimously allowed the appeal and now give our reasons for doing so.

Background Facts

[3] The appellant was working as a Junior Technician with the respondent. It was not disputed that he was instrumental in the unauthorized supply of electricity to 6 squatter houses at Lot 188, Batu 51/2, Jalan Tebrau, Pontian, Johor Bahru. He was then given a show cause letter on 6 January 1983, to which the appellant admitted his guilt with his letter of explanation (see AR p. 22). Thereafter, a disciplinary proceeding (the first disciplinary proceeding) was held against him on 17 July 1984. The appellant was present throughout the proceeding and he admitted his guilt and asked questions (see AR p. 65). Subsequently by letter dated 17 November 1984 (see AR 752) the disciplinary board ordered the appellant to be reduced in rank from Junior Technician to "Buruh Am" (general labourer) effective from 1 December 1984, with a final warning of dismissal, if there be a repetition by him. It is a matter of dispute that the appellant refused to do the work of a sweeper/general labourer. It was the respondent's contention that since the appellant absented himself from work since 13 April 1985, the District Disciplinary Committee (the second disciplinary

A proceeding) initiated action against the appellant resulting in his dismissal from service effective from 13 April 1985. The appellant then applied to the High Court for declaratory reliefs but it was subsequently dismissed. Hence this appeal.

B The Appeal

[4] Learned counsel for the appellant submitted that he was only relying on the grounds as per his petition of appeal ie, ground 14 and 16. He abandoned the other grounds. (See AR Vol. 1, pp. 4-5).

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Ground 14

[5] Under this ground, it was argued for the appellant that there were two disciplinary proceedings against him. The first proceeding resulted in a reduction of his rank from a Junior Technician to a "Buruh Am" (general labourer), while the second disciplinary proceeding ended with the appellant's dismissal from service.

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[6] The main grouse of the appellant is that he was prejudiced because he was not present at the hearing of the 2nd disciplinary proceeding. Moreover the respondent's official, Pn. Khalidah's (SD2) presence at the said proceeding had prejudiced the appellant as she was the one who framed the charge against him.

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[7] The charge dated 7 October 1985 against the appellant reads:

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Satu Laporan telah diterima memaklumkan bahawa tuan telah didapati tidak hadir bekerja dari 13-4-1985 sehingga sekarang tanpa apa-apa kenyataan dan kebenaran cuti daripada Ketua Jabatan tuan. Oleh itu tuan telah melakukan satu kesalahan di bawah Kaedah 21, Kaedah-Kaedah 1983.

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Tuan adalah dengan ini diminta memberi jawapan kepada pertuduhan yang dikemukakan dengan memberi sebab-sebab mengapa tindakan tatatertib untuk tuan dibuang kerja tidak sepatutnya diambil terhadap tuan. Tuan diberi tempoh 14 hari dari tarikh surat ini diterima untuk mengemukakan hujah-hujah tuan. Sekiranya tuan tidak memberi sebarang jawapan dalam tempoh masa yang ditetapkan itu, tuan akan dianggap sebagai tidak hendak membela diri dan perkara ini akan terus diputuskan di atas keterangan-keterangan yang ada sekarang ini sahaja.

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[8] Learned counsel for the respondent in his reply argued that it was the appellant himself who refused to accept the show cause letter/charge which was sent by registered post, although he was

just living on the other side of the road of the local office of the respondent. Even when the show cause letter was finally served personally by the respondent's security guard (SD4) the appellant still did not offer any explanation as required within the stipulated time of 14 days. The show cause letter also stated that if the appellant failed to respond, the Disciplinary Committee may proceed to hear and if necessary dismiss him, which they eventually did in this case.

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Ground 16

[9] Learned counsel for the appellant submitted that the appellant's dismissal was void as the respondent had failed to comply with their own Rules and Regulations, (the Electricity Act 1949 (Revised 1973)) in particular r. 22.1, r. 24 and r. 32.1 of Chapter III – Conduct and Discipline Index.

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Rule 22.1 provides:

Where the conduct of a Board employee appears to merit dismissal or reduction in rank a full report shall be made on the matter, through the proper channels, to the Responsible Authority, if he agrees that there is a *prima facie* case for dismissal or reduction in rank, shall instruct that the grounds upon which such action is being contemplated be communicated to the employee who shall be required to submit a written explanation of his conduct with such reasons as he may wish to advance in mitigation thereof; such written evidence to be sent to the Responsible Authority through the correct channels within ten days of the origination of the communication informing the employee of the proposed disciplinary action to be taken against him.

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Rule 24.1 reads:

Where disciplinary action is contemplated against an L & M. G. employee of less than 10 years service, the Responsible Authority will ensure that the employee is given every opportunity to exculpate himself but it may prove to be impossible to secure from such an employee any written grounds for exculpation and personal interrogation of the offender and witnesses may prove the only satisfactory solution.

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Rule 32.1 reads:

Dismissal Notices

When an employee is dismissed from the service of the Board the notice of dismissal together with the grounds therefore shall be communicated to him in writing and if necessary by registered post.

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A [10] Although he conceded that no grounds were given by the disciplinary board in compliance with r. 32.1, the learned counsel for the respondent however argued that the learned High Court Judge did not cover the issue under r. 32.1. because the matter was not raised in submission.

B **Court's Decision**

[11] A disciplinary proceeding is quasi-criminal in nature and therefore strict compliance of its procedural rules and regulations need to be observed.

C [12] Regarding ground 14, we are of the view that there is no merit in the argument raised by the appellant's counsel. As found by the learned trial judge, the appellant's absence at the 2nd disciplinary proceeding was due to his own misdoing by deliberately refusing to accept the show cause letter posted to him by the respondent. In fact the learned judge found that the respondent had taken all reasonable steps to give the appellant every opportunity to explain regarding his misconduct in the unauthorized supply of electricity to six squatter houses.

E [13] On the issue of SD2's presence at the disciplinary proceeding, we find that Khalidah bt. Haron (SD2) was the respondent's official who framed the charge with a view to dismissing the appellant. But she was also in the enquiry room when the disciplinary proceeding was conducted on 17 July 1984 (see AR Vol. 3 p. 58).

F [14] In *Rohana bte Ariffin and Anor v. University Sains Malaysia* [1989] 1 MLJ 487 it was, *inter alia* held:

G (1) The proceedings before the disciplinary authority were contrary to natural justice owing to the presence of the registrar of the respondent university, the complainant in the case of both the applicants, during the disciplinary authority's deliberations. In this case the registrar was very far from being a mere nominal complainant and had shown active partisanship in the proceedings before the disciplinary authority.

H [15] In view of the above, we find that there was a breach of the rules of natural justice by Khalidah's presence at the disciplinary proceedings against the appellant.

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[16] Regarding ground 16 ie, the non-compliance of r. 32.1, as stated earlier, the learned counsel for the respondent had conceded that no grounds were given by the disciplinary board. This would be a contravention of r. 25.1 and r. 25.2 of the NEB Rules and Regulations. A

[17] Learned counsel for the respondent submitted that the NEB Staff Rules and Regulations” of which Chapter III (The NEB Rules) are strictly in-house rules for their administrative purposes only and have no statutory force of law. We disagree. The NEB Rules were made under the Electricity Act 1949 by virtue of s. 89A which provides that: B
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89A. Disciplinary Rules

The Board may, with the approval of the Minister, make disciplinary rules to provide for the discipline of officers and servants of the Board and such rules may provide for: D

- (a) The interdiction with a reduction in salary or in other remuneration or without salary or other remuneration;
- (b) The procedure for disciplinary proceeding; E
- (c) The composition of the sub-committee for the purposes of section 12A;
- (d) The composition of the Board when an appeal is considered pursuant to section 12(8); F
- (e) The procedure for making representations by the person against whom disciplinary proceedings are being taken; and
- (f) The creation of disciplinary offences and punishments therefore and such punishments may extend to dismissal or reduction in rank; G

[18] In fact the respondent made their charge against the appellant based on these NEB Rules and thereafter dismissed him also under these Rules. The respondent cannot now say, that these Rules have no force of law because they were made pursuant to the Electricity Act. H

[19] The respondent’s letter dated 26 May 1986 informing the appellant of his dismissal from service with immediate effect did not provide any grounds for the dismissal (see AR Vol. 3 p. 754). The appellant’s letter to the respondent dated 5 June 1986 clearly stated that the appellant was not given the opportunity to appeal I

- A against the punishment of reduction in rank and that he was not informed about the charges and the grounds why he was given notice to quit. (see AR Vol. 3 p. 768). In spite of the appellant's letter, the respondent still did not give him the grounds asked for but merely informed him by letter dated 1 October 1987 that after
- B considering the matter as a whole, the board confirmed the punishment of dismissal against the appellant with effect from 13 April 1985 (see AR Vol. 3 p. 772).

[20] As was held in *Rohana's case supra, inter alia*:

- C (2) It is a well-established principle of administrative law that anything that restricts or appears to restrict the defendant's ability to present his case may be held to be a breach of procedural fairness and is thereby susceptible to judicial review. In this case the disciplinary authority had refused to accede to the requests of
- D the applicants' solicitors and counsel for pre-trial discovery. This was tantamount to denying the applicants their right to make written representations. The right to be heard necessarily means the right to know the case against oneself.

- E [21] The duty to give reasons was lucidly explained by the Federal Court in the case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65.

- F [22] We hold that the non-compliance by the respondent of r. 32.1 of the NEB Rules and the failure to give the appellant the reasons for his dismissal clearly are in breach of the rules of natural justice.

- G [23] For the above reasons, we allowed this appeal with costs here and below.

[24] Damages are to be assessed by the senior assistant registrar of the High Court. Deposit is to be returned to the appellant.

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